STATE OF MICHIGAN

COURT OF APPEALS

KAREN JENKINS,

Plaintiff-Appellant,

v

WILLIAM BEAUMONT HOSPITAL,

Defendant-Appellee.

UNPUBLISHED
December 19, 2006

No. 263056
Oakland Circuit Court
LC No. 01-035823-NH

Before: Jansen, P.J., and Sawyer and Bandstra, JJ.

PER CURIAM.

In this medical malpractice case, plaintiff appeals as of right from a judgment of no cause of action in favor of defendant following a jury trial. We affirm.

This case arises from the Beaumont Hospital emergency room physicians' alleged failure to examine and diagnose an infection in plaintiff's left breast on two separate occasions. Plaintiff had a bilateral reduction mammaplasty (breast reduction surgery) on April 29, 1999, and presented at the emergency room at Beaumont on July 17, 1999, and July 22, 1999, complaining of upper quadrant abdominal pain. However, on both occasions, plaintiff never indicated that she was having chest and/or breast pain or discomfort. Plaintiff was kept overnight on each visit, released and instructed to follow up if her symptoms persisted. On July 26, 1999, after four days of worsening symptoms, plaintiff was admitted in the emergency room at Sinai Grace Hospital where she was subsequently diagnosed with toxic shock caused by an infection and cellulitis (swelling) in her left breast. Plaintiff subsequently filed a complaint in Oakland Circuit Court alleging that defendant's physicians breached the standard of care when they failed to examine and diagnose an infection in her left breast and discontinued the use of antibiotics. Following an eight-day trial, the jury found that defendant was not professionally negligent and the trial court subsequently entered a judgment of no cause of action. This appeal followed.

Plaintiff first argues that the trial court erred in denying her motions for directed verdict and her motion for judgment notwithstanding the verdict because Dr. James Getzinger's testimony, who was defendant's employee and the attending physician during plaintiff's initial visit, established that defendant's physicians breached the standard of care. We disagree.

"This Court reviews de novo the trial court's decisions on a motion for a directed verdict and a motion for JNOV [a judgment notwithstanding the verdict]." *Zantel Marketing Agency v Whitesell Corp*, 265 Mich App 559, 568; 696 NW2d 735 (2005). A directed verdict is

appropriate only when no factual question exists on which reasonable jurors could differ. *Id.* "The appellate court reviews all the evidence presented up to the time of the directed verdict motion, considers that evidence in a light most favorable to the nonmoving party, and determines whether a question of fact existed." *Id.* Similarly, this Court views the evidence and all reasonable inferences in a light most favorable to the nonmoving party to determine if a trial court properly denied a JNOV. *Linsell v Applied Handling, Inc*, 266 Mich App 1, 11; 697 NW2d 913 (2005). "If reasonable jurors could have reached different conclusions, the jury verdict must stand." *Id.*

To prove a medical malpractice cause of action, a plaintiff must establish four elements: "(1) the appropriate standard of care governing the defendant's conduct at the time of the purported negligence, (2) that the defendant breached the standard of care, (3) that the plaintiff was injured, and (4) that the plaintiff's injuries were the proximate result of the defendant's breach of the applicable standard of care." *Craig v Oakwood Hosp*, 471 Mich 67, 86; 684 NW2d 296 (2004). "A hospital may be 1) directly liable for malpractice, through claims of negligence in supervision of staff physicians as well as selection and retention of medical staff, or 2) vicariously liable for the negligence of its agents." *Cox v Flint Bd of Hosp Managers*, 467 Mich 1, 11; 651 NW2d 356 (2002) (citations omitted).

Pursuant to MCL 600.2912a, the plaintiff has the burden of proving that in light of the state of the art existing at the time of the alleged malpractice:

> (a) The defendant, if a general practitioner, failed to provide the plaintiff the recognized standard of acceptable professional practice or care in the community in which the defendant practices or in a similar community, and that as a proximate result of the defendant failing to provide that standard, the plaintiff suffered an injury.
>
> (b) The defendant, if a specialist, failed to provide the recognized standard of practice or care within that specialty as reasonably applied in light of the facilities available in the community or other facilities reasonably available under the circumstances, and as a proximate result of the defendant failing to provide that standard, the plaintiff suffered an injury.

"Expert testimony is required in medical malpractice cases to establish the applicable standard of care and to demonstrate that the defendant somehow breached that standard." *Wiley v Henry Ford Cottage Hosp*, 257 Mich App 488, 494; 668 NW2d 402 (2003). However, a plaintiff may establish the standard of care through defense witnesses. *Id.* at 493. "[I]nterns and residents, as nonspecialists, are held to the standard of care of the local community or similar communities." *Bahr v Harper-Grace Hosp*, 448 Mich 135, 138; 528 NW2d 170 (1995).

Plaintiff argues that Getzinger's testimony and a medical history taken by Dr. Larry Smith,[1] a resident at Beaumont, conclusively establish that defendant breached the standard of

[1] The lower court record indicates that Smith did not testify at trial because he was in the military (continued…)

care by failing to give plaintiff a breast examination on July 17, 1999. To support this conclusion, plaintiff first relies on Smith's note, which provides in part that plaintiff

> denies any chest pain, shortness of breath, recent flu-like symptoms except for the upper respiratory infection. She does admit to taking Ciprofloxacin and Augmentin over the past two weeks for infection on her breast status post a breast reduction.

Additionally, plaintiff relies on Getzinger's testimony during direct examination regarding plaintiff's oral medical history

> *Q.* Did you talk to Dr. Smith and get a history from him as to what medications she told him she was on before you went in to see her?
>
> *A.* He would have presented to me, yes.
>
> *Q.* All right. If he had presented to you?
>
> *A.* I can't say what he told me word for word.
>
> *Q.* Well, he should have presented [the history obtained by Smith] to you; correct?
>
> *A.* He may have mentioned it, yes.
>
> *Q.* Okay. So if he had mentioned it to you, you would have known that she at least gave him a history of being on the Cipro and the Augmentin and that she had had a breast reduction; correct?
>
> *A.* (Indiscernible), yes.
>
> *Q.* So you know that she had this breast reduction in April; correct?
>
> *A.* Correct.
>
> * * *
>
> *Q.* Well, why would you have mentioned [in Getzinger's dictation that plaintiff was on antibiotics following breast reduction surgery]?
>
> *A.* That she'd been on an antibiotic for a breast infection, that would have warranted an examination. Had she complained of any discomfort I would have examined her. At no point during my examination did she complain of any breast discomfort.

(…continued)

"overseas."

Q. Okay. So it would have warranted an examination of her breasts if you knew she was on antibiotics for a breast infection from a surgery in April?

A. I would ask the patient if she would like me to examine – that is a matter of routine habit, that I would ask the patient if she would like me to evaluate that. It's a personal area, I don't routinely do that unless they allow me permission to do that.

Finally, plaintiff relies on Getzinger's testimony regarding the appropriate standard of care

Q. Well, let's put it this way, didn't the standard of care require Dr. Smith to do a breast exam on that history?

A. He would discuss it with the patient. I don't know.

Q. Okay. And if the patient allowed it, then the standard of care would require him to do a breast exam; correct?

A. If she complained of something with the breast; correct.

Q. Well, not about the complaints, just on what's in the history about the antibiotics used for two weeks for the infection. I'm not talking about any complaints now.

A. Okay.

Q. Based on what you have testified about and based on what's in the records of Dr. Smith, Dr. Smith was required to do a breast examination on this patient; isn't that true?

A. He would have asked her, I would – the standard of care would have been to ask her if she wanted a breast examination.

* * *

Q. So if Dr. Smith had asked the patient and the patient refused, that should have been in that record; correct?

A. I can't suppose what he would say, but I would suppose that would be yes.

Q. And if he has asked the patient and the patient refused, that's definitely something that he should have talked to you about, as his supervisor; correct?

A. If it was something to do with her complaints, yes.

* * *

Q. And if you did not offer her a breast examination at that time, based on the information in that record, emergency room record only, you also would have violated the standard of care; correct?

Mr. Babiarz [defense counsel]*:* Same objection, your Honor.

The Court: The Court will allow the question.

A. Based on just the emergency record, if she – if I had not documented – yes.

We conclude that, when plaintiff moved for a directed verdict before the fourth day of trial, a question of fact existed regarding whether Getzinger and Smith breached the standard of care. During direct examination, plaintiff's counsel limited Getzinger's testimony to a hypothetical situation wherein Getzinger and Smith were only aware of Smith's note indicating that plaintiff admitted "to taking Ciprofloxacin and Augmentin over the past two weeks for infection on her breast status post a breast reduction." Getzinger testified that, if either he or Smith were *only* aware of that history, then the standard of care would require that they offer to examine plaintiff's breast because it would indicate the possibility of an infection.

However, Getzinger testified that neither physician breached the standard of care based on the facts that Getzinger and Smith were actually aware of at the time of plaintiff's initial visit to Beaumont. Getzinger testified that either he or Smith *would* have breached the standard of care, based on the facts known at the time of plaintiff's visit, only if either physician: (1) was aware that plaintiff had been on antibiotics for a breast infection for two weeks following the breast reduction surgery; and (2) plaintiff complained of breast pain or discomfort or specifically requested that a physician examine her breasts. A review of the record shows that a question of fact existed regarding whether either of these circumstances existed. Getzinger testified that he obtained an oral history from plaintiff and that her chief complaint was upper abdominal pain. Plaintiff told Getzinger that she was not currently taking Ciprofloxacin and that the Augmentin prescription was for an upper respiratory tract infection. Smith only lists plaintiff's current medication as Augmentin in the July 17, 1999, note. Getzinger testified that he thought that the Augmentin was causing plaintiff's gastric discomfort. Furthermore, the record shows that during plaintiff's 24-hour stay at Beaumont from July 17, 1999, to July 18, 1999, plaintiff never complained of breast pain or discomfort to either Getzinger or Smith. Additionally, there is no record that plaintiff requested a breast examination. Contrarily, the record reflects that plaintiff specifically denied any chest discomfort to both Smith and Getzinger. Therefore, the trial court properly denied plaintiff's first motion for a directed verdict on the issue of breach of the standard of care.

Furthermore, we conclude that the trial court properly denied plaintiff's second motion for a directed verdict and plaintiff's motion for a JNOV. First, during plaintiff's July 12, 1999, follow-up visit with Dr. Sari Ram, the surgeon who performed her breast reduction surgery, he examined her left breast and noted that there was no evidence of acute inflammation and that any swelling was on the way out. Ram testified that plaintiff indicated that she discontinued taking Ciprofloxacin on July 5, 1999, approximately two weeks before her initial visit to Beaumont. According to plaintiff's testimony at trial, she informed a physician at Beaumont on July 17, 1999, that she had taken Ciprofloxacin "in the past." Second, during plaintiff's annual exam

with Dr. Lance Christianson, her primary care physician, on July 15, 1999, he diagnosed her with an upper respiratory infection and prescribed Augmentin. According to both Smith's and Getzinger's records, plaintiff indicated that she was only taking Augmentin for the upper respiratory infection.

Third, during plaintiff's July 21, 1999, to July 22, 1999, visit at Beaumont, she did not complain of any breast pain or discomfort until after being discharged. She was then instructed to follow up with Ram if her symptoms persisted. The record shows that plaintiff's temperature, white blood count and neutrophil count during her second visit to the emergency room were within normal limits. Defendant's standard of care expert, Dr. Glen Tokarski, testified that, from his review of the records, there was no indication that defendant's left breast was infected and defendant's physicians were not required to conduct a breast examination. He based this conclusion on (1) the fact that plaintiff did not indicate that she was suffering breast pain during her stay, (2) plaintiff's chief complaint of epigastric pain and (3) the normal lab results. Tokarski concluded that defendant's physicians did not breach the standard of care on either of plaintiff's visits. Therefore, viewing the foregoing evidence in a light most favorable to defendant, reasonable jurors could have concluded that defendant did not breach the standard of care. Accordingly, the trial court properly denied plaintiff's second motion for a directed verdict and plaintiff's motion for a JNOV.

Plaintiff next argues that the trial court erred in admitting evidence that indicated that plaintiff exhibited drug seeking behavior during prior emergency room visits to Beaumont and other hospitals. Plaintiff contends that extrinsic evidence was inadmissible pursuant to MRE 608(b) to attack plaintiff's credibility and that any evidence or testimony regarding plaintiff's prior emergency room visits was also inadmissible pursuant to MRE 404(b). While we agree with plaintiff that the challenged evidence was inadmissible under MRE 608(b), we conclude that evidence and testimony regarding plaintiff's prior emergency room visits were admissible under MRE 404(b).

Generally, a trial court's ruling on an evidentiary issue is reviewed for an abuse of discretion. *Lewis v LeGrow*, 258 Mich App 175, 200; 670 NW2d 675 (2003). Because plaintiff failed to preserve this evidentiary error below, we review whether plain error affected plaintiff's substantial rights. *Hilgendorf v St John Hosp & Medical Ctr Corp,* 245 Mich App 670, 700; 630 NW2d 356 (2001). "To avoid forfeiture under the plain error rule, three requirements must be met: 1) the error must have occurred, 2) the error was plain, i.e., clear or obvious, 3) and the plain error affected substantial rights." *People v Carines,* 460 Mich 750, 763; 597 NW2d 130 (1999).

Generally, specific instances of conduct, other than convictions, introduced for the purpose of attacking a witness's credibility may not be proved by extrinsic evidence. MRE 608(b). Specific instances of conduct may "be inquired into on cross-examination of the witness (1) concerning the witness's character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified." MRE 608(b); see also *Persichini v William Beaumont Hosp*, 238 Mich App 626, 632; 607 NW2d 100 (1999). However, "[e]vidence that is admitted for a proper purpose under MRE 404(b) can be proved by relevant extrinsic evidence." *People v Jackson*, 475 Mich 909; 717 NW2d 871 (2006).

A review of the lower court record shows that defendant introduced various medical records during its cross-examination of plaintiff and plaintiff's witnesses. Each of the records references or raises the inference that plaintiff exhibited drug-seeking behavior or abused narcotic medication. Although plaintiff argues on appeal that all of the challenged examinations were supported with extrinsic evidence, a review of the record shows that defendant introduced evidentiary support for its proposition on six separate occasions. Furthermore, because plaintiff failed to object pursuant to MRE 608(b), it is unclear from the record below whether defendant offered each specific instance of conduct to attack plaintiff's character for truthfulness or untruthfulness or for another purpose. If each instance was offered to solely attack plaintiff's credibility, we would conclude that defendant could not properly raise and support each specific instance of conduct with extrinsic evidence during its examination of plaintiff and other witnesses. However, as defendant argues, the specific instances of plaintiff's drug seeking behavior might have also been properly admitted for another purpose and were admissible under a separate rule of evidence. "That our Rules of Evidence preclude the use of evidence for one purpose simply does not render the evidence inadmissible for other purposes." *People v Sabin (After Remand),* 463 Mich 43, 56; 614 NW2d 888 (2000). Accordingly, we must determine whether the challenged evidence satisfies the elements under MRE 404(b) for introduction of other acts evidence.

Plaintiff argues that the trial court erred in admitting evidence and allowing defendant to elicit testimony that plaintiff was a drug seeker and had a history of abusing narcotic medication. Plaintiff contends the challenged evidence was inadmissible character evidence under MRE 404(b). For the reasons set forth below, we disagree.

Rule 404(b) applies equally in both civil and criminal cases. *Lewis, supra* at 207. MRE 404(b)(1) provides:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident when the same is material, whether such other crimes, wrongs, or acts are contemporaneous with, or prior or subsequent to the conduct at issue in the case.

The *Lewis* Court, citing *People v VanderVliet,* 444 Mich 52, 74; 508 NW2d 114 (1993), mod 445 Mich 1205; 520 NW2d 338 (1994), set forth the elements that must be satisfied for other acts evidence to be admitted in a civil case:

> (1) the evidence is offered for some purpose other than character to conduct, or a propensity theory; (2) the evidence is relevant (having any tendency to make the existence of a fact more or less probable) and material (relating to a fact of consequence to the trial); (3) the trial court determines under MRE 403 that the probative value of the evidence is not substantially outweighed by the danger of unfair prejudice; and (4) the trial court may provide a limiting instruction under MRE 105. [*Lewis, supra* at 208.]

A proper purpose is one other than establishing the plaintiff's character to show her propensity to commit the offense. *Elezovic v Ford Motor Co*, 259 Mich App 187, 206; 673 NW2d 776 (2003), aff'd in part, rev'd in part 472 Mich 408 (2005).

For example, in *Lewis, supra* at 178-181, three female plaintiffs brought suit against the male defendant, alleging that he secretly videotaped the plaintiffs on separate occasions having consensual sex with the defendant at his house. At trial, the plaintiffs introduced testimony from a witness indicating that the defendant had previously spied on the witness's girlfriend during an overnight stay at the defendant's house. *Id*. at 206. The plaintiffs argued that the evidence showed the defendant "was a 'voyeur' who secretly videotaped" the plaintiffs and that "the purpose of the evidence was to show habit or routine, and that the evidence showed a scheme, plan, or system." *Id*. at 206-207. However, this Court disagreed and found that the evidence was offered for an improper purpose under MRE 404(b), i.e., "that defendant acted in accordance with his character of being a voyeur." *Id*. at 207.

In *Elezovic*, *supra* at 190-191, the plaintiff brought a sexual harassment and gender discrimination suit against her employer, alleging that her supervisor was making inappropriate sexual advances, exposing his penis and masturbating in the plaintiff's presence on various occasions. At trial, the plaintiff moved to introduce evidence of the supervisor's prior conviction for indecent exposure; however, the trial court denied the plaintiff's motion. *Id*. at 204-205. This Court affirmed, concluding that the evidence was not offered for a proper purpose and reasoning that an "act of indecent exposure outside the workplace is not sufficiently similar to sexually harassing an employee in the workplace to establish a common plan, scheme, or system." *Id*. at 206.

In the present case, we conclude that the trial court properly admitted the challenged evidence and testimony. This other acts evidence was admissible pursuant to MRE 404(b). First, the other acts evidence was offered for some purpose other than a propensity theory. *Lewis, supra* at 208. Defendant offered the evidence to show plaintiff had a similar "motive . . . scheme, plan, or system in doing an act." MRE 404(b). Specifically, the record shows the challenged evidence and testimony was offered to show that plaintiff would have identified any complaints of pain she had during both visits to Beaumont. The other acts evidence shows plaintiff was familiar with Beaumont's protocol because she visited the emergency room on multiple occasions before July 17, 1999. Additionally, it raised the inference that plaintiff's purpose for each emergency room visit was to obtain a specific type of narcotic medication and that, to accomplish this end, plaintiff would normally complain of a migraine headache and abdominal pain. In light of the issues raised by both parties, the evidence was not offered under an improper propensity theory.

Second, the other acts evidence is relevant and material. Evidence is relevant if it tends to make a fact of consequence to the action more or less probable than it would be in the absence of such evidence. MRE 401. The other acts evidence offered by defendant was relevant because it tended to show that plaintiff presented to the emergency room on previous occasions with the same or similar complaints that she raised on July 17, 1999, and July 21, 1999. Further, it tended to show that one of plaintiff's primary reasons for visiting the Beaumont emergency room was to obtain narcotic medication. This made more likely defendant's theory that: (1) plaintiff either did not give a complete medical history or complain of breast pain or infection during each visit;

and (2) defendant's physicians did not breach the applicable standard of care. Thus, the evidence was relevant and material.

Third, pursuant to MRE 403, the probative value of the evidence is not substantially outweighed by the danger of unfair prejudice. The balancing test within MRE 403 requires the exclusion of relevant evidence only when its probative value is substantially outweighed by the risk of unfair prejudice. *Roulston v Tendercare (Michigan), Inc*, 239 Mich App 270, 282-283; 608 NW2d 525 (2000). Unfair prejudice refers to the tendency that the jury will give the evidence undue or preemptive weight. *Franzel v Kerr Mfg Co*, 234 Mich App 600, 618; 600 NW2d 66 (1999). As noted, *supra*, the other acts evidence has substantial probative value in showing that plaintiff had a common scheme or plan in presenting to the Beaumont emergency room with specific complaints of pain and specific narcotic medication requests. Further, in light of the substantial amount of testimony offered by both parties regarding the appropriate standard of care, there is nothing in the lower court record to indicate that the jury would give the evidence undue or preemptive weight. *Id*.

Finally, regarding the last element, a review of the lower court record shows that the trial court did not provide a limiting instruction under MRE 105. However, plaintiff did not request such an instruction and expressed satisfaction to the trial court after the standard jury instructions were read to the jury. Moreover, as the *Lewis* court noted, whether to give a limiting instruction is discretionary and is only one of the four factors to consider when determining if other acts evidence is properly admitted. *Lewis, supra* at 208 (noting that the trial court may provide a limiting instruction under MRE 105).

We conclude that the other acts evidence was properly admitted under MRE 404(b). Accordingly, extrinsic evidence was admissible to prove each specific instance of conduct. *Jackson, supra* at 909. Consequently, there has been no plain error affecting plaintiff's substantial rights, and she is not entitled to relief on such grounds. *Hilgendorf, supra* at 700.

Affirmed.

/s/ Kathleen Jansen
/s/ David H. Sawyer
/s/ Richard A. Bandstra